Supreme Court, U.S.
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No. 96-1982

In the Supreme Court of the United States

OCTOBER TERM, 1996

ELENO AGUIRRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his claim that the district court's jury selection process violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1878.

2. Whether the district court's pre-*voir dire* dismissal of more than 100 potential jurors violated the Jury Selection and Service Act.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

United States v. *Bearden*, 659 F.2d 590 (5th Cir. 1981)	10
United States v. *Calabrese*, 942 F.2d 218 (3d Cir. 1991)	3, 8, 10
United States v. *Contreras*, 108 F.3d 1255 (10th Cir. 1997), petition for cert. pending, No. 96-9286	4, 8, 9, 10
United States v. *Foxworth*, 599 F.2d 1 (1st Cir. 1979)	7
United States v. *Kennedy*, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865 (1977)	7
United States v. *LaChance*, 788 F.2d 856 (2d Cir.), cert. denied, 479 U.S. 883 (1986)	7
United States v. *Maldonado*, 849 F.2d 522 (11th Cir. 1988)	7
United States v. *Paradies*, 98 F.3d 1266 (11th Cir. 1996), cert. denied, 117 S. Ct. 2483 (1997), petition for cert. pending, No. 96-1346	8
United States v. *Percival*, 756 F.2d 600 (7th Cir. 1985)	8
United States v. *Wellington*, 754 F.2d 1457 (9th Cir.), cert. denied, 474 U.S. 1032 (1985)	7

Constitution and statutes: Page

U.S. Const.:
Amend. V 4
Amend. VI 4-5
Jury Selection and Servic Act of 1968, 28 U.S.C. 1861 *et seq.*:
28 U.S.C. 1863(a) 5
28 U.S.C. 1866(c) 5, 8, 9
28 U.S.C. 1867 6
28 U.S.C. 1867(a) 6
28 U.S.C. 1867(d) 4, 6, 8
28 U.S.C. 1867(e) 6
18 U.S.C. 1956(a)(1)(B)(i) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 854 2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 108 F.3d 1284.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1997. The petition for a writ of certiorari was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was

convicted of conspiring to distribute, and to possess with intent to distribute, marijuana and cocaine, in violation of 21 U.S.C. 846; money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); investing drug proceeds, in violation of 21 U.S.C. 854; and possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to a term of 235 months' imprisonment, to be followed by a five-year period of supervised release. The court of appeals affirmed. Pet. App. A1-A16.

1. Petitioner's brother, Gabriel Aguirre, headed a drug trafficking organization that sold large quantities of marijuana and cocaine. Between 1984 and 1992, the organization sold more than 20,000 pounds of marijuana and more than 20,000 pounds of cocaine throughout the United States. The organization used drug proceeds to acquire real property and other assets. Petitioner participated in his brother's drug trafficking organization. Petitioner and twenty-one others were indicted for their drug trafficking activities. The original trial resulted in a mistrial. Pet. App. A2-A3.

2. Before the retrial of petitioner and his co-defendants, the district court randomly selected a panel of approximately 250 prospective jurors. After reviewing juror questionnaires, the district court directed 115 of those prospective jurors to report for jury service and excused the rest. Petitioner and his co-defendants received the juror questionnaires and learned about the court's actions six days before the start of trial. Pet. App. A3.

On the first day of trial, before jury selection, one of petitioner's co-defendants filed a motion alleging that the jury venire underrepresented the Hispanic and American Indian population of the District of

New Mexico; all defendants joined in the motion. Defendants also sought to stay the trial so that they could conduct an investigation aimed at proving that claim. Counsel for one of petitioner's co-defendants also stated orally that one prospective juror apparently was excused because she knew one of the defendants. Counsel argued that such an exclusion constituted reversible error under *United States* v. *Calabrese*, 942 F.2d 218 (3d Cir. 1991). Pet. App. A3-A4.

The district court conducted an evidentiary hearing. Nancy Metzger, a jury administrator for the United States District Court for the District of New Mexico, testified that the jury panel of 250 jurors had been selected at random from voter registration lists in the Roswell Division of the District of New Mexico. She further testified that the district judge reviewed the juror questionnaires and directed her to excuse more than 100 of those jurors. Metzger testified that she did not know the ethnicity of either the excused jurors or the jurors who had reported for service. Pet. App. A4.

The district court stated that it had reviewed the juror questionnaires it had received from the clerk's office and had retained the questionnaires of the jurors "who, for some reason or other, claimed that they couldn't serve." Pet. App. A4. The court further stated:

> I think it goes without saying that the ones that were not summoned, I never looked at the last name, whether it was [a] Hispanic surname or whether it was not a Hispanic surname, or whether they were American Indians or not. As a

> matter of fact, I'm not real sure that that's part of the questionnaire.

Id. at A5. Metzger confirmed that the questionnaire did not require the jurors to specify their ethnicity. *Ibid.*

The district court denied defense motions to stay the proceedings and to quash the jury venire. The district court invited the defendants to supplement the record with information concerning the racial composition of the jury pool in the District of New Mexico and the Roswell Division, but defendants chose not to do so. Following a trial, petitioner was convicted on all four counts on which he was charged. Pet. App. A5.

3. The court of appeals affirmed. Pet. App. A1-A16. The court rejected petitioner's contention that the district court's dismissal of more than 100 prospective jurors violated the Jury Selection and Service Act. The court noted that 28 U.S.C. 1867(d) requires all motions challenging compliance with that Act to be accompanied by a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the [Act]." Pet. App. A7. Because petitioner "failed to file a sworn affidavit in support of his motions challenging the district court's jury selection procedures," the court concluded that petitioner's "Jury Selection and Service Act claim is barred." *Ibid.* The court noted that it had reached the same conclusion in *United States* v. *Contreras*, 108 F.3d 1265, 1266-1268 (10th Cir. 1997), petition for cert. pending, No. 96-9286, an appeal by one of petitioner's co-defendants.

Relying on *Contreras*, the court of appeals also rejected petitioner's Fifth Amendment and Sixth

Amendment challenges to the jury selection procedures. Pet. App. A8. The court noted that it had determined in *Contreras* that "Ms. Contreras could not establish a *prima facie* case of a fair cross section violation or an equal protection violation," and that "Ms. Contreras' Sixth Amendment impartial jury claim was without merit." *Ibid.* For the same reasons, the court found "no merit in [petitioner's] constitutional challenges to the jury selection procedures." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 21-25) that the court of appeals erred in holding that he waived his claim under the Jury Selection and Service Act. That contention is without merit and does not warrant review.

a. The Jury Selection and Service Act of 1968 governs the selection of grand and petit juries in federal court. The Act requires each federal district court to devise a written plan for the random selection of jurors. 28 U.S.C. 1863(a). Under the Act, jurors may be removed from service only (1) upon a showing of undue hardship or extreme inconvenience, (2) on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, (3) upon peremptory challenge, (4) for good cause shown, or (5) upon determination that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. 28 U.S.C. 1866(c).

A party challenging the jury selection process under the Act must make that challenge "before the voir dire examination begins, or within seven days after the defendant discovered or could have dis-

covered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. 1867(a). The defendant's motion to dismiss the indictment must contain a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the [Act]." 28 U.S.C. 1867(d). If the court determines that there has been a substantial failure to comply with the Act, "the court shall stay the proceedings pending the selection of a petit jury in conformity with [the Act]." *Ibid.* The procedures prescribed in 28 U.S.C. 1867 "shall be the exclusive means by which a person * * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of [the Act]." 28 U.S.C. 1867(e).

b. In this case, petitioner concedes (see Pet. 21) that he did not file the sworn statement required by 28 U.S.C. 1867(d) as a prerequisite to a challenge under the Act. He nonetheless contends (Pet. 22) that his procedural default should be excused because the evidentiary hearing in this case fulfilled the purpose of the sworn statement requirement. Section 1867(d), however, unequivocally requires a motion challenging jury selection procedures to contain "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the [Act]." The Act does not create any exceptions from that requirement. To the contrary, it provides that the procedures prescribed under Section 1867 "shall be the exclusive means" by which a person may challenge jury selection procedures. 28 U.S.C. 1867(e). The court of appeals therefore correctly concluded that petitioner's claim was barred by the text of the Act.

The court of appeals' holding that the Act requires strict compliance with the sworn statement require-

ment is consistent with decisions from other circuits. For example, in *United States* v. *Kennedy*, 548 F.2d 608, 612-614, cert. denied, 434 U.S. 865 (1977), the Fifth Circuit held that the defendant forfeited his claim under the Jury Selection and Service Act by failing to comply with the sworn statement requirement, even though the undisputed facts known to the district court established a substantial violation of the Act. The court reasoned that "Congress left no room for ad hoc review of the usefulness of compliance with [the sworn statement] requirement." *Id.* at 613. The court further explained that:

> [i]n the Act, Congress set out a uniform, relatively strict scheme for jury selection. Congress included a new remedy for substantial violations of the Act, regardless of whether the litigant challenging the jury had been prejudiced by the jury selection. As a price for this remedy, Congress was entitled to exact strict compliance with formal procedural rules.

Ibid.

Other courts of appeals have likewise strictly enforced the sworn statement requirement. See *United States* v. *Maldonado*, 849 F.2d 522, 523 (11th Cir. 1988) (per curiam) (defendant failed to preserve objection to jury selection because no sworn statement was submitted with motion); *United States* v. *LaChance*, 788 F.2d 856, 876 (2d Cir.) (untimely motion that did not contain sworn statement of facts properly denied), cert. denied, 479 U.S. 883 (1986); *United States* v. *Wellington*, 754 F.2d 1457, 1468 (9th Cir.) (defendant's failure to file sworn statement precluded relief), cert. denied, 474 U.S. 1032 (1985); *United States* v. *Foxworth*, 599 F.2d 1, 3 (1st Cir. 1979) (report filed with

motion was not sworn and therefore precluded challenge to jury selection process); see also *United States* v. *Paradies*, 98 F.3d 1266, 1277-1278 (11th Cir. 1996) (although defendants filed sworn statement with timely motion objecting to district court's *sua sponte* excusal of more than 70 potential jurors before *voir dire*, challenge to jury selection process was barred because statement did not assert facts that, if true, would have constituted violation of Act), cert. denied, 117 S. Ct. 2483 (1997), and petition for cert. pending, No. 96-1346; *United States* v. *Percival*, 756 F.2d 600, 614-615 (7th Cir. 1985) (challenge to jury selection properly denied where sworn statement did not show substantial violation of Act).

c. Petitioner contends (Pet. 24) that the decision below conflicts with the Third Circuit's decision in *United States* v. *Calabrese*, 942 F.2d 218, 222 (1991). In *Calabrese*, a defendant elicited the testimony of a court clerk that a significant number of jurors had been excluded based solely on the ground that they knew one of the defendants. The court of appeals held that the defendant had adequately preserved his claim that the exclusions violated the Jury Selection and Service Act, even though he had not filed the sworn statement required by Section 1867(d). The court reasoned that the clerk's testimony contained "undisputed facts" (*id.* at 222) that established a substantial violation of the Act (*id.* at 227-229). In particular, the court concluded that the clerk's testimony established that the district court had effectively created "a new category of exclusions" beyond those set forth in Section 1866(c). *Id.* at 228.

As the Tenth Circuit stated in *Contreras*, the exception to the sworn statement requirement created in *Calabrese* is "contrary to the overwhelming

weight of authority." 108 F.3d at 1267. Even if such an exception were recognized, however, petitioner could not benefit from it. The evidence at the hearing in this case established only that the clerk randomly selected a panel, and that the district judge excused certain jurors based on their questionnaires. Pet. App. A4-A5. Those limited facts do not establish a substantial violation of the Act. As noted above, the Jury Selection and Service Act expressly authorizes a district court to excuse jurors for certain reasons, 28 U.S.C. 1866(c), and no evidence elicited at the hearing established that the district court in this case excused jurors for reasons other than those set forth in the Act. Indeed, in pressing his claim of a Jury Selection and Service Act violation, petitioner ultimately relies (Pet. 15-16, 19-20) on his assessment of whether the jury questionnaires furnished a permissible basis for exclusion, not solely on evidence adduced at the hearing. The decision in *Calabrese* therefore does not provide a basis for granting review in this case.

2. Petitioner contends (Pet. 17-21) that the district court's pre-*voir dire* dismissal of more than 100 jurors violated the Jury Selection and Service Act. Because the court of appeals held that petitioner waived his claim under the Act, however, it did not address that contention. That issue is therefore not properly presented here.

In any event, petitioner errs in contending that the district court's dismissal of jurors constituted a substantial failure to comply with the Act. In determining whether there has been a "substantial" violation, courts of appeals have examined both the number of errors, and whether there has been a frustration of the Act's basic principle of exclusion on the basis of

objective criteria only. *Calabrese*, 942 F.2d at 227-228; *United States* v. *Bearden*, 659 F.2d 590, 607 (5th Cir. 1981). Thus, a substantial violation generally cannot be found if the number of errors is small. *Ibid.* And while the application of nonstatutory, subjective criteria can constitute a substantial failure to comply with the Act, the mere misapplication of the objective criteria set forth in the Act cannot. *Calabrese*, 942 F.2d at 228; *Bearden*, 659 F.2d at 608.

Judged by those standards, there was not a substantial violation of the Act in this case. After a "thorough review of the excused-juror questionnaires" in this case, the court of appeals in *Contreras* concluded that "all but perhaps two of the dismissed jurors were eligible under the Jury Selection and Service Act for dismissal based on undue hardship or bias." 108 F.3d at 1269. As to those jurors eligible for dismissal, the district court did not abuse its discretion in excusing them. *Ibid.* Of the remaining two jurors, one was dismissed because she may have known one of the defendants, and the other was dismissed after stating on her questionnaire that she was unable to serve for confidential reasons. *Id.* at 1269-1270. If the district court erred in dismissing those two jurors, the errors affected an insignificant number of jurors. The errors stemmed from a misapplication of the objective criteria of bias and hardship, and not from the application of nonstatutory, subjective criteria. Such errors do not constitute a "substantial" failure to comply with the Act. In any event, that fact-bound issue does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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